IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October, 1999 Session

ISAAC L. HERRON v. JACK MORGAN, WARDEN, ET AL.

Direct Appeal from the Circuit Court for Hickman County
No. 98-5083C-I Donald P. Harris, Judge

No. M1999-02774-COA-R3-CV - Filed August 9, 2000

A state prisoner appeals the trial court's dismissal of his 42 U.S.C. § 1983 lawsuit alleging cruel and unusual punishment arising from a corrections officer's actions in bringing disciplinary charges for which the prisoner received a verbal warning. The prisoner also appeals the trial court's order directing the Commissioner of Corrections to forfeit a number of the prisoner's sentence reduction credits pursuant to Tenn. Code Ann. §41-21-816 for filing a frivolous claim. Because the complaint fails to state a claim of a violation of the Eighth Amendment, we affirm the dismissal. Because the claim had no basis in law and no chance of success, we affirm the trial court's finding that the claim was frivolous. Because Tenn. Code Ann. §41-21-816 does not contemplate court involvement in calculating the appropriate number of credits to be forfeited for the filing of frivolous lawsuits, we vacate the trial court's order to the Commissioner of Corrections.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part, Vacated in Part and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Isaac L. Herron, Only, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General, Pamela S. Lorch, Assistant Attorney General, for the appellees, Jack Morgan, Warden, and Lorenzo Lore, Corrections Officer.

OPINION

Isaac L. Herron, a state prisoner, filed this *pro se* civil rights action *in forma pauperis*. His claims purportedly arose from a "verbal conversation regarding the use of the telephone" with Defendant Lore, a corrections officer. According to Mr. Herron, when he requested a grievance form from Mr. Lore, who had just spoken to him in a derogatory manner, Mr. Lore immediately retaliated by charging him with a disciplinary infraction for threatening and refusing a direct order of a

corrections officer. Mr. Herron was tried in a disciplinary hearing and found guilty of this infraction and was issued a verbal warning. Based on this incident, Mr. Lore's alleged failure to give Mr. Herron a grievance form and his allegedly retaliatory filing of a disciplinary writeup against Mr. Herron, Mr. Herron sued.

I.

Although Mr. Herron initialy alleged a variety of causes of action, he affirmatively waived all his claims except his claim alleging denial of the Eighth Amendment guarantee against cruel and unusual punishment.[1] The trial court dismissed this claim for failure to state a claim upon which relief can be granted. We affirm.

A motion to dismiss for failure to state a claim upon which relief can be granted tests only the sufficiency of the complaint, not the strength of the plaintiff's proof. *See Merriman v. Smith*, 599 S.W.2d 548, 560 (Tenn. Ct. App. 1979); Tenn. R. Civ. P. 12.02(6). On a motion to dismiss, we must take the factual allegations as true and may dismiss only if it appears that the nonmovant was entitled to no relief under the facts alleged. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59, 65 (1984); *Gordon v. City of Henderson*, 766 S.W.2d 784, 787 (Tenn. 1989).

We find that Mr. Herron was entitled to no relief because the allegations at issue simply do not rise to the level of an Eighth Amendment violation. Prison officials violate the Eighth Amendment only when two requirements are met. "First, the deprivation alleged must be, objectively, 'sufficiently serious' . . . ; a prison official's act or omission must result in the denial of the 'minimal civilized measure of life's necessities.'" *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977, 128 L.Ed.2d 811, 823 (1994) (citations omitted). "The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" *Id.* Thus, a prison official must act with a "sufficiently culpable state of mind" to inflict a cruel and unusual punishment under the Eight Amendment. *Id.*; *see Berryman v. Rieger*, 150 F.3d 561, 566 (6th Cir. 1998); *see also Luther v. Compton*, 5 S.W.3d 635 (Tenn. 1999). Prisoners who suffer pain needlessly when relief is readily available have a cause of action against those whose deliberate indifference is the cause of the suffering. *See Boretti v. Wiscomb*, 930 F.2d 1150, 1154-55 (6th Cir. 1991). Here, Mr. Herron's claim that he was subjected to retaliative

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[1]In responding to a motion to dismiss which raised a number of procedural issues, the most relevant being failure to exhaust administrative remedies, Mr. Herron stated, in part, that his grievance:

> addressed only one subject: "[v]iolation of plaintiff's Fourteenth Amendment right to the Constitution as a result of grievant being denied the equal protection and substantive due process guarantees against cruel and unusual punishment guaranteed by the Eighth Amendment by Warden Morgan and CO1 L. Lore."... The only subject discussed in the grievance is violation of plaintiff's Fourteenth Amendment right against cruel and unusual punishment, nothing more.

Like the trial court, we believe it is not inappropriate to hold Mr. Herron to his waiver. *See Smith v. Frazier*, 189 Tenn. 71, 78, 222 S.W.2d 367, 370 (1949) (Where a party expressly requests that a court proceed in a certain manner, such party "will not be allowed to complain of such action.").

disciplinary charges which resulted only in a verbal warning simply does not rise to the requisite level of an "unnecessary and wanton infliction of pain" violative of the Eighth Amendment. Further, Mr. Herron's claims that he was denied a grievance form when he asked for one, even though he obviously received a form to initiate the grievance he claims as a prerequisite to this lawsuit, does not state a claim for cruel and unusual punishment. *See Collmar v. Wilkinson*, No. 97-4374, 1999 WL 623708 at *3 (6th Cir. Aug. 11, 1999) (finding that a retaliative, false disciplinary action did not violate the Eighth Amendment). Therefore, we affirm the trial court's dismissal of Mr. Herron's Eighth Amendment claim.

II.

Mr. Herron argues that the trial court abused its discretion by finding that his complaint was sufficiently frivolous to warrant the forfeiture of sentence credits. We disagree.

A finding by a trial court that an *in forma pauperis* action filed by an inmate is frivolous or malicious carries a number of consequences, including authority for the court to dismiss the complaint prior to service of process on the defendants, Tenn. Code Ann. § 41-21-804(a), payment of court costs and related expenses through deductions from the prisoner's trust account and otherwise, Tenn. Code Ann. § 41-21-807, prohibitions on filing subsequent lawsuits until prior costs are paid, Tenn. Code Ann. § 41-21-812, and forfeiture of good conduct sentence reduction credits, Tenn. Code Ann. § 41-21-816. Tenn. Code Ann. § 41-21-804(b) sets forth three factors for courts to consider in determining whether a claim is frivolous. These factors are: "(1) whether the claim has a chance of success; (2) whether the claim has a basis in law and in fact; and (3) whether the claim is substantially similar to a previous claim filed by the inmate. . . ." Tenn. Code Ann. § 41-21-804(b). A claim which meets these factors is, obviously, also subject to dismissal for failure to state a claim upon which relief can be granted. This court has held that a motion to dismiss for failure to state a claim also constitutes a motion to dismiss the case as frivolous. *See Sweatt v. Raney*, No. W1999-02458-COA-R3-CV, 2000 WL 791820 at *4 (Tenn. Ct. App. June 14, 2000) (no Tenn. R. App. P. 11 application filed). "We do not wish to imply that every complaint which fails to state a claim under Tenn. R. Civ. P. 12.02(6) is necessarily frivolous." *Cobb v. Wilson*, No. 02A01-9811-CV000308, 1999 WL 1097847 at *2 (Tenn. Ct. App. Oct. 6, 1999) (no Tenn. R. App. P. 11 application filed) (relying parenthetically on the following language in Neitzke v. Williams, 490 U.S. 319, 329, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338, 349 (1989): "finding of a failure to state a claim does not invariably mean that the claim is without arguable merit.") However, dismissal on such grounds certainly meets any minimum requirement for consideration as a frivolous claim.

The trial court herein found that Mr. Herron's claim had no basis in law or fact and had no chance of success and, consequently, found the complaint to be frivolous. We review that finding under an abuse of discretion standard. *See Farnsworth v. Compton*, No. 02A01-9809-CV-00257, 1999 WL 360567 at *2 n.1 (Tenn. Ct. App. June 7, 1999) (no Tenn. R. App. P. 11 application filed). Not only do we think the trial court acted within its discretion, we agree with its finding. Mr. Herron clearly failed to state an Eighth Amendment claim and expressly waived his other claims. His complaint had no chance of success and no facts set forth therein stated a cognizable claim.

Accordingly, we affirm the trial court's finding that Mr. Herron's claims were frivolous within the meaning of Tenn. Code Ann. § 41-21-804(b).

III.

Mr. Herron argues that the trial court improperly ordered the Commissioner of Corrections to forfeit one hundred twenty (120) days of Mr. Herron's sentence reduction credits. Consideration of this argument must begin with the statutes which authorize such forfeiture. Tenn. Code Ann. § 41-21-816 (a) provides:

> The commissioner shall forfeit an inmate's good conduct sentence reduction credits in the amount specified in subsection (b) on:
>
> (1) Receipt by the department of a certified copy of a final order of a state or federal court that dismisses as frivolous or malicious a claim or lawsuit filed by an inmate while the inmate was in the custody of the department; and
>
> (2) A determination that the department has, on one (1) or more occasions, received a certified copy of a final order of a state or federal court dismissing as frivolous or malicious a claim or lawsuit filed previously by the inmate while the inmate was in the custody of the department.

Tenn. Code Ann. § 41-21-816(a).

Subsection (b) of § 41-21-816 sets out the amount of sentence reduction credits the Commissioner is to forfeit, depending, essentially, on the number of cases the prisoner has filed which have been dismissed as frivolous.

Under our reading of the statute, authority for the forfeiture of credits and the determination of the number of credits to be forfeited is given to the Commissioner. We see no basis for the trial court's judgment directing the Commissioner to forfeit a specific number of credits. The judicial function lies in the determination of the merits of the lawsuit and whether it was frivolous, and the court's responsibility with regard to the implementation of Tenn. Code Ann. § 41-21-816 is to send to the Department of Correction a certified copy of its final order dismissing a claim as frivolous. *See* Tenn. Code Ann. § 41-21-807(a). Because forfeiture and the number of days forfeited are triggered by receipt by the Department of certified orders dismissing cases as frivolous, the Commissioner is in the position to apply the statute according to its terms. In view of the language of the statute, the trial court's order directing the Commissioner to forfeit one hundred and twenty (120) days of Mr. Herron's sentencing credits is vacated. This holding in no way prevents the Commissioner from fulfilling his responsibility under the statute.

Our decision to vacate the order directing the reduction of the sentencing credits on the ground that the trial court acted beyond its authority renders moot other issues raised by Mr. Herron regarding that forfeiture.

IV.

In its final order, the trial court ordered that court costs and filing fees be taxed to Mr. Herron and, acting pursuant to Tenn. Code Ann. § 41-21-812, directed the clerk to decline for filing all Mr. Herron's other claims not seeking injunctive relief from an act or failure to act that created a threat of serious physical injury or irreparable physical harm until he paid those costs. For the first time on appeal, Mr. Herron challenges the constitutionality of Tenn. Code Ann. § 41-21-812. This issue cannot be raised and heard for the first time on appeal. *See Lawrence v. Stanford,* 655 S.W.2d 927, 929 (Tenn. 1983).

V.

In the trial court, Mr. Herron sought an order directing the office of the Attomey General to recuse itself from this civil rights action. The trial court denied that motion. On appeal, Mr. Herron maintains that the defendants were sued in their personal capacities only, and were sued for criminal acts, and thus were not entitled to representation by the Attorney General.

Tenn. Code Ann. § 8-42-103 grants the Attorney General the discretion to provide legal representation to state employees who are sued in civil actions for damages for any acts or omissions occurring within the scope of their employment. The record clearly shows that defendants were state employees acting within the scope of their employment when the cause of action arose. Thus, the Attorney General and Reporter was acting within his discretion when he decided to provide representation to the defendants. The Attorney General may provide such representation through his assistants or through other attorneys. "The method of providing representation is within the sole discretion of the attorney general and reporter." Tenn. Code Ann. § 8-42-103(a)(3).

Further, Tenn. Code Ann. § 8-42-108 states, "All decisions and determinations of the attorney general and reporter shall be final and shall not be reviewable by any court." Thus, the Attorney General's exercise of discretion here is not reviewable. We affirm the trial court on this issue.

VI.

Accordingly, the decisions of the trial court to dismiss the underlying action and to deem the claims asserted frivolous within the meaning of Tenn Code Ann § 41-21-804(a)(2) are affirmed. The

trial court's order to the Commissioner to forfeit a specific number of sentence credits is vacated and the case is remanded for such proceedings as are necessary. Costs of this appeal are taxed to Appellant for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE